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No. 57463-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

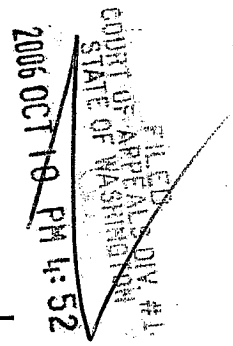
STATE OF WASHINGTON,

Respondent,

v.

GANTRY LOMONE MATTHEWS,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sharon Armstrong

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. Mr. Matthews right to due process and a fair trial under the Fourteenth Amendment to the United States Constitution was violated when the trial court denied his motion for a mistrial for a violation of the court's *in limine* order.

2. The trial court erred in failing to dismiss the information for a violation of the mandatory joinder rule.

3. The trial court erred in failing to dismiss the matter based upon a violation of the time for trial rule.

4. There was insufficient evidence to support the jury's verdict that Mr. Matthews intentionally killed Mr. Villarosa.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clauses of the United States and Washington Constitutions require that a defendant be afforded a fair trial. Intentional misconduct by a witness is grounds for reversal of the defendant's conviction where the misconduct results in prejudice so substantial that a jury instruction admonishing the jury to disregard the testimony of the witness is insufficient to cleanse the taint. Must Mr. Matthews' conviction be reversed where Officer O'Keefe intentionally offered that his investigation began by looking through booking photographs thus violating an *in*

limine order of the court and injecting into the trial the inference that Mr. Matthews had been arrested and likely convicted on a prior occasion, such testimony being so prejudicial that the court's admonition to the jury to disregard the remark was insufficient to cleanse the taint?

2. Principles of mandatory joinder and speedy trial require that related offenses be tried together. Second degree intentional murder and felony murder are related offenses for mandatory joinder purposes. Where as here, the State proceeded on intentional murder after Mr. Matthews' conviction for felony murder was overturned, and all the facts which supported the intentional murder prosecution were known at the time the State proceeded on felony murder, do the principles of mandatory joinder and speedy trial bar the State from proceeding?

3. Under the Sixth and Fourteenth Amendments to the United States Constitution, the State bears the burden of proving each element of the charged offense beyond a reasonable doubt. Intent to kill is an essential element of intentional second degree murder. Did the State sustain its burden of proof where it proved only that Mr. Villarosa inexplicably grabbed Mr. Matthews' gun from

him, the two struggled mightily, and the gun went off twice during the struggle, fatally wounding Mr. Villarosa?

C. STATEMENT OF THE CASE

After an evening of enjoyment with friends, in the early morning hours of November 30, 1994, Gantry Matthews, his girlfriend, Angela Lambert, and her friend, Tysonia Green, were looking for someplace that was open to get something to eat while driving in Ms. Green's car. 11/8/05RP 77-81; 11/10/05RP140-43. The group ended up at a 7-11 store in the Rainier Beach neighborhood of Seattle. 11/8/05RP 82; 11/10/05RP 143. Mr. Matthews and Ms. Lambert went into the store while Ms. Green waited outside in the car. 11/8/05RP 82-83; 11/10/05RP 144-45.

At some point, Ms. Lambert heard a commotion in the store, and saw Mr. Matthews and one of the clerks in the store, Simeon Villarosa, in a physical struggle with both men's hands on a handgun. 11/8/05RP 86-88. Ms. Lambert went to try to break up the struggle, and at some point heard a gunshot and glass shatter, whereupon she was thrown to the floor. 11/8/05RP 87-90. Ms. Lambert got up and again tried to stop Mr. Matthews and Mr. Villarosa from wrestling, heard a second gunshot and again was thrown to the ground. 11/8/05RP 144-45. Immediately after

hearing the second gunshot, Ms. Lambert saw Mr. Villarosa flying backwards and falling to the floor. 11/8/05RP 145-47. Mr. Matthews and Ms. Lambert immediately left the store, entered Ms, Green's car and fled. 11/8/05RP 148. According to Ms. Green, as the car left the 7-11 store parking lot, Ms. Lambert was hysterical, repeatedly asking Mr. Matthews why he shot Mr. Villarosa. 11/10/05RP 146. According to Ms. Green, Mr. Matthews allegedly stated because he, Mr. Matthews, was a gangster. 11/10/05RP 146.

Alisa Binongal, the other clerk in the 7-11 store with Mr. Villarosa initially heard Mr. Villarosa say "no, no, no" and ordered her to call the police. 11/9/05RP 15. Ms. Binongal saw Mr. Matthews and Mr. Villarosa struggling over a handgun, then heard a gunshot. 11/9/05RP 16. She immediately fled to the backroom and did not see what transpired after the first gunshot. 11/8/9/05 16.

Mr. Matthews testified he was carrying a handgun it in the pocket of his leather jacket when he entered the 7-11 store. 11/14/05RP 89-90. As he was shopping for something to eat, he saw Mr. Villarosa mopping the floor. 11/14/05RP 101. As Mr. Matthews was looking at some sandwiches, Mr. Villarosa attempted

to pull the handgun from Mr. Matthews' jacket, and ordered Ms. Binongal to call the police. 11/14/05RP 104. Mr. Matthews and Mr. Villarosa continued to struggle over the gun, a struggle Mr. Matthews described as an "all out struggle." 11/14/05RP 105. At one point Mr. Matthews slipped and began to fall when the gun fired. 11/14/05RP 108-09. The two continued to struggle over the gun until the gun fired again, fatally injuring Mr. Villarosa. 11/14/05RP 111. Ms. Lambert helped Mr. Matthews to his feet and the two fled. 11/14/05RP 113. Mr. Matthews was adamant that he did not intentionally shoot the gun at Mr. Villarosa either time the gun went off. 11/14/05RP 118, 135.

Mr. Matthews was subsequently charged with, and convicted of, second degree intentional murder.[1] CP 106, 186.

[1] Mr. Matthews was originally charged and convicted of second degree felony murder based upon the commission of an assault. CP 4, 23-26. His conviction was overturned and remanded to the trial court. CP 23-26. He was charged with second degree intentional murder. CP 27. The first retrial ended with the jury deadlocked and the court declaring a mistrial.

D. ARGUMENT

1. OFFICER O'KEEFE'S INTENTIONAL VIOLATION OF THE *IN LIMINE* ORDER OF THE COURT MANDATED A MISTRIAL

Prior to the second trial, Mr. Matthews moved *in limine* for an order of the court adhering to the court's order in the 1994 trial barring admission of a photograph of Andrea Lambert sitting on Mr. Matthews' lap at the police station after both had been arrested. 06/28/05RP 43. Mr. Matthews also sought to confirm the rulings from the 1994 trial excluding evidence of Mr. Matthews' prior convictions or arrests. 6/28/05RP 42. Both of these orders were adopted again prior to the third trial. 11/3/05RP 33, 40-41.

During the cross-examination of Officer O'Keefe at the third trial regarding the police investigation, he was asked the following question:

> Q: You learned Gantry Matthews' name or full name at about 1:00 that afternoon, is that right?
> A: Correct, we took the information from Tysonia Green, we interviewed her about quarter of 11 after we reviewed the videotape. We interviewed Tysonia Green, she gave us the name of Gantry Matthews. *The detective started working on the name from the picture on King County booking file.*

11/10/05RP 31 (emphasis added). The defense immediately objected and moved to strike the officer's statement, and the court concurred, striking the testimony. 11/10/05RP 31.

Later in the officer's cross-examination he was asked:

> Q: At what point in time was [Mr. Matthews'] contact with Miss Lambert that took place in your presence and lasts about five minutes in terms of the sequence of events?
>
> A: Well, she was being fingerprinted and brought to the room. We brought her inside, Detective Lima and I were in the same room *and she sat down on his lap.* They talked.

11/10/05RP 47 (emphasis added). Again the defense objected and moved to strike the testimony, and again the trial court concurred, striking the testimony. 11/10/05RP 47.

At the conclusion of the officer's testimony, the defense moved for a mistrial based upon the officer's violation of the court's *in limine* orders. 11/10/05RP 51. The prosecutor noted she went over the officer's testimony prior to the trial and advised him of the court's rulings. *Id.* The court noted it felt the officer "must have intentionally violated the rulings of the limine [sic] the prosecutor conveyed to him." 11/10/05RP 55.

> The only question in my mind is whether the jury, knowing that the defendant had prior booking photos, i.e., booking photos taken at the jail from previous arrests, means that he cannot have a fair trial and I'm

> going to essentially hold the motion in abeyance and see if there is anything else that adds to the problem.

11/10/05RP 55. Despite its concern, at the close of evidence, the court denied the motion for a mistrial without comment. 11/15/05RP 34.

a. Principles of due process guaranteed Mr. Matthews a fair trial. A witness's misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

b. Witness misconduct violates the defendant's right to a fair trial. It has been recognized that witness' misconduct can require a new trial. *State v. Taylor*, 60 Wn.2d 32, 371 P.2d 617 (1962); *State v. Devlin*, 145 Wash. 44, 258 P. 826 (1927). Witness misconduct generally entails a witness providing intentionally inadmissible and unsolicited testimony or engaging in extraordinary conduct likely to prejudice the trier of fact. *See Taylor*, 60 Wn.2d at (witness intentionally injected impermissible testimony); *Storey v. Storey*, 21 Wn.App. 370, 585 P.2d 183 (1978), *review denied*, 91 Wn.2d 1017 (1979) (witness purposely injected impermissible testimony to influence the jury); *State v. Harstad*, 17 Wn.App. 631, 564 P.2d 824 (1977), *review denied*, 89 Wn.2d 1013 (1978).

Taylor has direct applicability to the case at hand. At Taylor's trial for second degree burglary, the investigating officer twice referred to contacting Taylor's parole officer despite defense objections to the questions. *Taylor*, 60 Wn.2d at 33. A post-trial motion for a mistrial was granted by the court and the State appealed. The Supreme Court affirmed the trial court's granting a new trial, finding the officer's reference to Taylor's parole officer to be an "evidential harpoon," so prejudicial that only a new trial would

remedy matter. *Taylor,* 60 Wn.2d at 37. According to the Court, the prejudice arose from the character of the witness:

> The witness was a member of the Kent police department holding the rank of sergeant. The injection of the existence of Taylor's parole officer was deliberate. This is emphasized by the fact that the witness reiterated the comment about the defendant's parole officer as soon as the motion was overruled.

Taylor, 60 Wn.2d at 36. Citing *Wright v. State*, 325 P.2d 1089 (Ok.Crim.App. 1958), the Court also found that any jury instruction to disregard the remark would have only aggravated the error. *Id.* at 37.

In *Wright*, a state narcotic agent testifying at defendant's trial for obtaining a narcotic drug by fraud, volunteered on direct examination that the defendant had admitted to him after arrest that he had served four previous terms in the penitentiary. *Wright,* 325 P.2d at 1091. The defense objected and the court, in sustaining the objection, admonished the jury to disregard the statement. *Id.* On appeal, the appellate court found the agent's testimony to be an "'evidential harpoon' that has been willfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider the issue." *Id.* at 1093.

> This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all out

> effort to obtain a conviction. We are fully aware that these harpoons are often thrown through inadvertence or ignorance of the law, but we cannot lead ourselves to believe that such was the case. The witness Hagstrom is one with long experience in law enforcement who now occupies the position of Narcotic Agent for the State of Oklahoma, affiliated with the Attorney General's office, which office serves as an advisor of the law to most state officials. Surely, he was conscious of the rules of evidence that prohibit such actions of a witness. It would seem unreasonable to say he was unaware of the consequences of his actions. It is of such universal recognition that elaborating seems useless to recite again that to place a defendant's character or reputation in issue before it becomes an element of the trial is error of the worse type. Evidence relative to previous conviction, with the exception of those alleged in the information is permitted for one purpose and one only and that is to effect the credibility of the witness. [Citation omitted]. And where defendant did not present himself as a witness nor present testimony of good character, it is forbidden. In a trial of a criminal case the issue is singular, as to guilt or innocence: "Did the defendant commit the crime charged?" and not upon the question, "Has the defendant the reputation of committing crime before."

Wright, 325 P.2d at 1093. The court ruled the "voluntary injection of such evidence was highly prejudicial and though the court sustained the objection and admonished the jury not to consider it, the bell could not be unrung." *Id.* The court concluded the testimony was a flagrant violation of the rules of evidence which, standing alone, was grounds for reversal of the conviction. *Id.*

In one additional decision from the Washington Supreme Court, *State v. Miles,* the Court stressed that instructions to the jury to disregard the testimony cannot remove the prejudice that results from witness misconduct as occurred here. 73 Wn.2d 67, 436 P.2d 198 (1968). Mr. Miles was on trial for robbing a liquor store in Yakima County. During the State's case, a Spokane police officer was asked about a teletype message his department received from the Yakima County Sheriff's Officer concerning the robbery, which provided the probable cause to arrest Mr. Miles. The officer testified the message described the suspects, the car which they were driving, and testified the message stated Mr. Miles and his compatriot were headed to Spokane "to duplicate the robbery." *Miles,* 73 Wn.2d at 68. The defense immediately moved for a mistrial. *Id.* The court denied the motion but instructed the jury to disregard the testimony of the officer concerning Mr. Miles' intentions. *Id.* The Supreme Court overturned the conviction, finding the remark "was calculated to and undoubtedly did implant in the minds of the jury the idea the defendants had committed robberies of this type and were therefore most likely to have committed the one charged." *Id.* at 69. But the Court went on to

note that the trial court's instruction to the jury did little to remove the taint, and in fact, may have emphasized the error:

> While it is presumed that juries follow instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

Miles, 73 Wn.2d at 71.

In the case at bar, the police officer injected a similar highly prejudicial "evidential harpoon," the fact that Mr. Matthews had previously been arrested, and by inference, convicted of offenses. The trial court ruled this act of volunteering this information was intentional by Officer O'Keefe, sustained the defense objection to the prejudicial testimony, and admonished the jury to disregard it. 11/10/05RP 31. But, as both the court in *Taylor* and *Wright* held, such action by the trial court is simply not enough to unring the bell after it has been rung. *Taylor,* 60 Wn.2d at 37-38; *Wright*, 325 P.2d at 1093. The trial court should have granted the defense motion for a mistrial in order to cleanse the taint and begin anew. The court's failure to grant the mistrial in light of the improper, intentional violation of the *in limine* order of the court by Officer O'Keefe "standing alone is indeed grounds for reversal." *Wright,* 325 P.2d

at 1093. This Court should reverse Mr. Matthews' conviction and remand so he has the opportunity to be given a fair trial. *Miles,* 73 Wn.2d at 72.

2. PRINCIPLES OF MANDATORY JOINDER AND SPEEDY TRIAL BARRED RETRIAL OF MR. MATTHEWS ON A DIFFERENT THEORY OF MURDER

a. Mandatory joinder rules prohibited Mr. Matthews' prosecution for second degree intentional murder which was not originally charged. Akin to the rules prohibiting successive prosecutions for the same offense, Washington bars prosecution for a "related offense" not joined in the original information. *State v. Dallas*, 126 Wn.2d 324, 328-29, 892 P.2d 1082 (1995); *State v. Anderson*, 96 Wn.2d 739, 741, 638 P.2d 1205 (1982); CrR 4.3.1(b)(1). When two offenses are based on the same conduct, they must be joined in the first prosecution. *Anderson*, 96 Wn.2d at 741; CrR 4.3.1(b).

In *State v. Russell,* the defendant was originally tried and the jury instructed on intentional second degree murder. 101 Wn.2d 349, 352, 678 P.2d 332 (1984). Russell asserted he could not be retried for the first time on second degree felony murder as an alternative means of committing second degree murder. *Id.* The

Supreme Court agreed that such a new charge would violate the issue preclusion provisions of former CrR 4.3(c).[2] The *Russell* Court held "intentional second degree murder and second degree felony murder are intimately connected and thus are related offenses within the above [CrR 4.3(c)] definition." *Id.* The *Russell* Court concluded "[f]ailure to join second degree felony murder in the original information precludes its inclusion for the first time by way of amendment in [a] second trial." *Russell,* 101 Wn.2d at 353.

Similarly, in *State v. Dallas,* the Supreme Court reaffirmed the rule that the State may not amend a criminal charging document to charge a different crime after the State has rested its case unless the amended charge is a lesser degree of the same charge or a lesser included offense. 126 Wn.2d at 327. In *Dallas,* the State attempted to bring a new charge of theft. *Id.* at 329. The *Dallas* Court reasoned that theft and possession of stolen property are related charges as defined under CrR 4.3(c)(1) because they are based on the same conduct and were within the jurisdiction and venue of the same court. *Id.* Both parties agreed that neither is a lesser included of the other. *Id.* The Supreme Court ruled "If

[2] Former CrR 4.3(c)(1) (1995) defined "related offenses" as "Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct."

neither is a lesser included of the other, the mandatory joinder rule would operate to require the second charge, theft, to have been brought in the original information or not at all." *Id.* at 329-30.

The *Dallas* Court agreed with this Court's reasoning in *State v. Carter:*

> If the defendant knows before the first trial that related offenses have been charged and he makes the appropriate motion, the offenses are merely joined; if the defendant does not have this knowledge before the first trial, the defendant's subsequent motion will bar prosecution of related offenses in *every* case in which the offenses would have been joined but for the prosecutor's failure to charge or to apprise the defendant of the charge.

Dallas, at 332 (citing *State v. Carter,* 56 Wn. App. 217, 221, 783 P.2d 589 (1989) (quoting *ABA Standards Relating to Joinder and Severance* § 1.3(c) commentary, at 23-24 (Approved Draft, 1968)).

The *Dallas* Court concluded that it made no difference whether the prosecutor intended to harass or was negligent in charging the wrong crime under former CrR 4.3(c), because the rule requires

> a dismissal of the second prosecution . . . [T]he prosecutor is not entitled to proceed against the Defendant . . . on the related theft charge. Because the mandatory joinder rule requires the dismissal of a refiled theft complaint in this case, as a matter of judicial economy we dismiss the case with prejudice. .

Dallas, 126 Wn.2d at 332. Thus, the State cannot retry a defendant on a related charge under the mandatory joinder rule.

Under this analysis, the State was barred from retrying Mr. Matthews on any other crime under the mandatory joinder rule. Because second degree felony murder has no lesser included offenses, the State could not re-prosecute Mr. Matthews on any other related crime, such as second degree intentional murder which was not originally charged. *Dallas,* 126 Wn.2d 329-30; *see State v. Tamalini,* 134 Wn.2d 725, 729, 953 P.2d 450 (1998), *citing State v. Davis,* 121 Wn.2d 1, 6, 846 P.2d 527 (1993) (second degree felony murder has no lesser included offenses). Accordingly, the only remedy in this case was for the trial court to preclude the State from retrying Mr. Matthews on second degree intentional murder. This Court must reverse Mr. Matthews' conviction as violative of the mandatory joinder rule and dismiss the charge with prejudice.

b. This Court's decision in *State v. Ramos* does not compel affirming the trial court's decision on the "ends of justice" exception to the mandatory joinder rule. The trial court denied Mr. Matthews' motion to dismiss the matter for a violation of the mandatory joinder rule, finding the Washington Supreme Court's decision in *In re the Personal Restraint of Andress,* 147 Wn.2d 602, 56 P.3d 981 (2002), was "truly unusual circumstances," and the "ends of justice" exception to the mandatory joinder rule, as interpreted by this Court in *State v. Ramos,* 124 Wn.App. 334, 101 P.3d 872 (2004), controlled. 5/26/05RP 22-23.

To invoke the "ends of justice" exception to the mandatory joinder rule, the State must show there exists "extraordinary circumstances" warranting its application. *Dallas,* 126 Wn.2d at 333, *citing Carter,* 56 Wn.App. at 223. The extraordinary circumstances used to invoke the "ends of justice" exception, "must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings." *Carter,* 56 Wn.App. at 333. Here, extraordinary circumstances did not exist, thus the exception did not apply.

In *Ramos,* Mr. Ramos and Mr. Medina were convicted of second degree felony murder and this Court vacated their

convictions pursuant to *Andress*. *Ramos,* 124 Wn.App. at 335. This Court went on to gratuitously determine whether the State was barred from retrying the two defendants for manslaughter on remand. The Court concluded that the mandatory joinder rule did not require *this Court* to dismiss the prosecution at that point, but left it to the trial court to determine whether the ends of justice exception would be defeated by dismissing manslaughter charges against the two:

> Other factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, *a determination for the trial court.* But we hold the mandatory joinder rule does not require this court to dismiss with prejudice *now*.

Ramos, 124 Wn.App. at 343 (emphasis added). Since the Court only had to reverse Mr. Ramos' conviction and remand to the trial court to determine whether the mandatory joinder rule barred further prosecution, the Court's statements about the applicability of the ends of justice exception was dicta, and thus has no precedential value. *State v. Watkins*, 61 Wn.App. 552, 559, 811 P.2d 953 (1991).

Further, the *Ramos* Court's analysis was based upon an inaccurate view that the Washington Supreme Court in *Andress*

had engaged in an "about face" repudiation of its earlier decisions upholding assault as a predicate offense for second degree felony murder, which ultimately constituted an extraordinary circumstance allowing the State to circumvent the mandatory joinder rule. *Ramos*, 124 Wn.App. at 342. But, as the *Andress* Court aptly noted:

> [T]he court . . . has [n]ever addressed [] the specific language of the amended statute in connection with the argument again advanced in this case. This is not surprising, because the statutorily-based challenges in *Harris, Thompson,* and *Wanrow* were brought by defendants convicted under the prior version of the second degree felony murder statute, former RCW 9.48.040. We are thus faced with a change in the language of the statute which has never been specifically analyzed in the context here.

Andress, 147 Wn.2d at 609. Thus, there was no "about face" but merely review of a different challenge to the statute.

Finally, the *Ramos* decision conflicts with the Washington Supreme Court's decision in *Russell*, which held that mandatory joinder barred the State from proceeding on a second degree intentional murder theory following a hung jury on a theory of felony murder. 101 Wn.2d at 353-53. Since the State here had the evidence to proceed to trial on a theory of intentional murder, as shown by its proof here, it certainly was aware of these facts when

it chose to proceed only on a theory of felony murder in 1995. The State necessary chose to proceed only on the felony murder theory because of the ease of proving that theory as opposed to proving intentional murder. Such a purposeful choice by the State cannot be termed extraordinary circumstances but a violation of the mandatory joinder rule. This Court should rule the State was barred from retrying Mr. Matthews and the trial court erred in denying his motion to dismiss the prosecution.

c. The violation of the speedy trial rules also barred retrial of Mr. Matthews. Under CrR 3.3 (c)(1), a defendant must be brought to trial within 60 days of arraignment if in custody, and within 90 days of arraignment if out of custody. CrR 3.3 does not address the situation in which multiple charges arise from the same criminal conduct or criminal episode. *State v. Peterson*, 90 Wn.2d 423, 431, 585 P.2d 66 (1978). *See also State v. Harris,* 130 Wn.2d 35, 44, 921 P.2d 1052 (1996) (applying *Peterson* rule to juvenile court proceedings). The speedy trial period "should begin on all crimes 'based on the same conduct or arising from the same criminal incident' from the time the defendant is held to answer any charge with respect to that conduct or episode." *Id*, *quoting* ABA, Standards Relating to Speedy Trial, std. 2.2 (Approved Draft,

1968). The speedy trial rule and the joinder rules are interrelated and designed to further the same goals; a prompt trial for the defendant once the prosecution has commenced. *Harris*, 130 Wn.2d at 43-44.

Here, any other charges arising out of the death of Mr. Villarosa would be barred by the speedy trial period since these charges arose out of the same criminal incident.

3. THE JURY'S VERDICT THAT THE DEATH OF MR. VILLAROSA WAS CAUSED BY AN INTENTIONAL ACT OF MR. MATTHEWS WAS UNSUPPORTED BY THE EVIDENCE

a. The State bears the burden of proving each of the essential elements of the charged offense. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221.

To convict Mr. Matthews of second degree murder, the jury had to find that he shot Mr. Villarosa, that he acted with intent to cause Mr. Villarosa's death, and that Mr. Villarosa died as a result of Mr. Matthews' acts. RCW 9A.32.050(1)(a). Since intent is an element of second degree murder, the State must prove it beyond a reasonable doubt. *State v. McCullum,* 98 Wn.2d 484, 495, 656 P.2d 1064 (1983). "A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

b. <u>There was insufficient evidence Mr. Mathews intended to kill Mr. Villarosa</u>. The testimony at trial, from the only two eyewitnesses to the event other than Mr. Mathews, Ms. Lambert and Ms. Binongal, proved only that Mr. Villarosa and Mr. Matthews for some unknown reason struggled over Mr. Matthews' gun. There was no testimony about how the struggle began, other than Mr. Matthews' testimony that Mr. Villarosa inexplicably grabbed the gun and attempted to wrest it away from Mr. Matthews. 11/14/05RP 105. In addition, there was no testimony as to how the

gunshots occurred. Both Ms. Lambert and Ms. Binongal testified they heard shots but were unable to say whether it happened accidentally or whether Mr. Villarosa or Mr. Mathews pulled the trigger. Thus, there was no evidence produced at trial that Mr. Mathews acted with an intent to kill Mr. Villarosa. At best, the evidence showed Mr. Mathews was carrying a gun for his safety, Mr. Mathews and Mr. Villarosa somehow struggled over the gun for an unknown reason, and Mr. Villarosa was killed when the gun somehow went off twice. There simply was no evidence from which the jury could conclude that Mr. Matthews acted with the intent to kill Mr. Villarosa.

c. This Court must reverse and remand with instructions to dismiss the conviction. Since the State failed to disprove self-defense, there was insufficient evidence to support the conviction and this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed

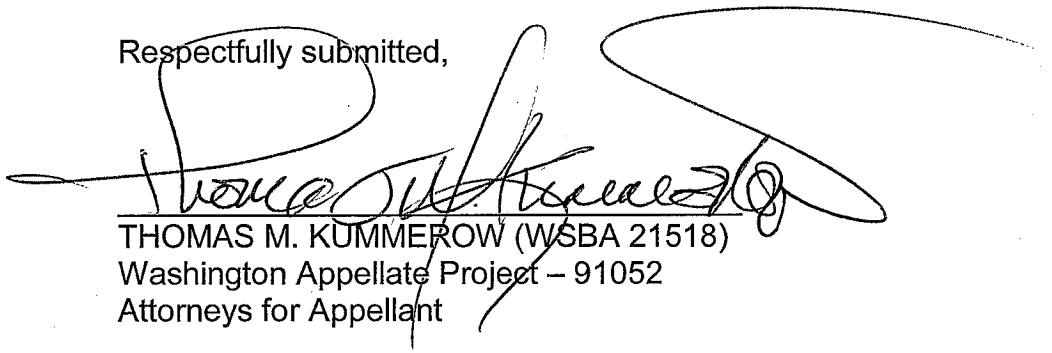
to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

E. CONCLUSION

For the reasons stated, Mr. Matthews submits this Court must reverse his conviction with instructions to dismiss or remand for retrial.

DATED this 10th day of October 2006.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. GANTRY MATTHEWS, Appellant.	)))))))))	NO. 57463-9-I

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 10TH DAY OF OCTOBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	GANTRY MATTHEWS 712725 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLE ROCK, WA 98556	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF OCTOBER, 2006.

X _____

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711